37024-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL HIATT, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Viewing the facts in the light most favorable to the State, and all rational inferences taken therefrom, did the State present sufficient evidence that the defendant possessed a stolen motor vehicle?

2. Where the State presented certified copies of the judgment and sentence documents for all of the defendant's prior offenses at his sentencing in this case, did the court properly determine the defendant's offender score?

3. Is Mr. Hiatt's claim that counsel violated his right to autonomy a manifest constitutional error that may be reviewed for the first time on appeal?

4. Did counsel violate the defendant's right to autonomy by signing the understanding of criminal history over the defendant's objection where the understanding of criminal history was not used to calculate the defendant's offender score?

5. Did counsel provide ineffective assistance at sentencing by signing the understanding of criminal history over the defendant's objection where the understanding of criminal history was not used to calculate the defendant's offender score?

II. STATEMENT OF THE CASE

The defendant, Michael Hiatt, was charged in the Spokane County Superior Court by amended information, with one count of possession of stolen motor vehicle and one count of possession of a motor vehicle theft tool. CP 4. Mr. Hiatt waived his right to a jury trial. CP 9. The Honorable Charnelle Bjelkengren presided over the trial.

On December 25, 2018, Officer Ethan Wilke was on patrol in the area of West Sharp Avenue and North Jefferson Street in Spokane County. CP 83 (FF 1). He observed a Ford Expedition which had been reported stolen. CP 83 (FF 1). The officer ran the license plate and discovered the vehicle had not been reported stolen. CP 83-84 (FF 2).

Officer Wilke observed a black Honda Accord chained to the front of the Expedition. CP 84 (FF 3). The vehicles were chained together and padlocked by their front bumpers, hood to hood. CP 84 (FF 4). Officer Wilke knew that early 1990s Honda Accords are often stolen in Spokane. CP 84 (FF 5). The Honda's driver's side window was broken out and there was shattered glass on the front seat. CP 84 (FF 6). The Honda did not have a license plate, so Officer Wilke checked the Vehicle Identification Number (VIN). CP 84 (FF 7). He learned the Honda was reported stolen. CP 84 (FF 8). Michael Hiatt exited the Explorer. CP 84 (FF 9). Officer Wilke determined Mr. Hiatt had outstanding misdemeanor

arrest warrants. CP 84 (FF 10). Officer Wilke placed Mr. Hiatt under arrest and advised him of his *Miranda* rights. CP 84 (FF 11). Mr. Hiatt acknowledged his rights and agreed to speak with Officer Wilke. CP 84 (FF 12).

Mr. Hiatt told Officer Wilke that the Ford belonged to him but was not registered in his name. CP 84 (FF 13). Mr. Hiatt told Officer Wilke that the Honda belonged to his buddy, but did not want to disclose his buddy's name. CP 84 (FF 14). Mr. Hiatt told Officer Wilke that his buddy had asked if he could chain the Honda to the Expedition; Mr. Hiatt allowed his friend to do so. CP 84 (FF 15-16).

The legal owner of the Honda was the brother of K.C. Chavez, who was using the car from approximately December 10, 2018, to December 24, 2018, when he last saw the vehicle. CP 84-85 (FF 17-18, 20). Mr. Chavez and his brother were the only two individuals with keys to the Honda. CP 85 (FF 19). Mr. Chavez last saw the vehicle on December 24, 2018, at 3:30 p.m. and filed a stolen vehicle report with Officer Zachary Johnson that same day. CP 85 (FF 20, 22).

After Officer Wilke discovered the Honda, Officer Johnson and Mr. Chavez went to the location and also observed the Honda; its ignition was "punched" and there was broken glass on the ground. CP 85 (FF 23, 25). Mr. Chavez also noted that the tires and rims were different than those

affixed to the Honda the day before, and the speakers, stereo and toolbox were missing. CP 85 (FF 28-29). Those items were never recovered. CP 85 (FF 30).

During a search incident to Mr. Hiatt's arrest, Officer Wilke found three key rings containing shaved keys in his pants pocket; based upon the officer's training and experience, shaved keys are commonly used to steal vehicles. CP 85 (FF 26-27).

From these facts, the court concluded that Mr. Hiatt knowingly received, retained, or possessed a motor vehicle by allowing his friend to chain the Honda to his Ford. CP 86 (CL 1). The court also concluded that Mr. Hiatt received the Honda from someone other than Mr. Chavez knowing the vehicle belonged to Mr. Chavez. CP 86 (CL 2). The court further concluded that Mr. Hiatt acted with knowledge that the Honda was stolen because of the visibly punched ignition and broken window. CP 86 (CL 3). By allowing the Honda to be chained to his Expedition, the court found that Mr. Hiatt withheld or appropriated the Honda to the use of someone other than the true owner. CP 86 (CL 4). Lastly, the court found that Mr. Hiatt knew that the shaved keys found in his pocket were intended to be used for motor vehicle theft. CP 86 (CL 7, 9).

The trial court found Mr. Hiatt guilty beyond a reasonable doubt of both counts. CP 86-87. Defense counsel challenged the use of most of the

defendant's prior criminal history to calculate his offender score, arguing the state was collaterally estopped from counting those offenses, as it previously agreed Mr. Hiatt's criminal history washed out. CP 41-57. Notwithstanding this argument, the trial court determined the defendant had an offender score of "15," relying on certified copies of his prior judgments, and sentenced him to 43 months in prison for the possession of a stolen motor vehicle offense, and 90 days for possessing a motor vehicle theft tool. CP 90; RP 118-19. Additional facts pertaining to the defendant's offender score calculation and sentencing are set forth below.

III. ARGUMENT

A. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY ADDRESS EACH ELEMENT OF THE CRIME OF POSSESSION OF A STOLEN MOTOR VEHICLE.

1. Standard of review.

To determine whether sufficient evidence supports a conviction, an appellate court views the evidence in the light most favorable to the prosecution and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel,* 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings of fact support the conclusions of law. *State v. Homan,*

181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Unchallenged findings of fact and those that are supported by substantial evidence are verities on appeal. *Id.* at 106. The court reviews challenges to a trial court's conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Substantial evidence exists when it is enough "to persuade a fair-minded person of the truth of the stated premise." *State v. Russell,* 180 Wn.2d 860, 866-67, 330 P.3d 151 (2014). Stated differently, substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irr. Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). These inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. Deference is given to the trier of fact who resolves conflicting testimony, evaluates witness credibility and decides the persuasiveness of material evidence. *State v. Carver,* 113 Wn.2d 591, 604, 781 P.2d 1308 (1989), *amended,* 113 Wn.2d 591 (1990).

2. The defendant fails to make any argument supporting his claim that finding of fact 1 was entered in error; regardless, this finding of fact is irrelevant to the court's ultimate conclusions of law.

The defendant challenges trial finding of fact 1, but provides no argument as to how the trial court erred in entering this finding or how any potential error affected the court's verdict. Because the defendant fails to make any argument in this regard, this Court should find this assignment of error abandoned. *Fulton v. Fulton*, 57 Wn.2d 331, 336, 357 P.2d 169 (1960); *Erdman v. Henderson*, 50 Wn.2d 296, 298, 311 P.2d 423 (1957).

In its finding of fact 1, the court found:

> On December 25, 2018, Officer Ethan Wilke was on patrol in the area of West Sharp Avenue and North Jefferson Street in Spokane County, Washington. He observed a Ford Expedition which had been reported as stolen.

CP 83.

The first sentence of this finding, establishing the date and jurisdiction, is supported by substantial evidence. RP 19 (Officer Wilke was on duty on December 25, 2018, near West Sharp and North Jefferson, in Spokane County). The second sentence, establishing that Officer Wilke observed a Ford Expedition that had been reported stolen is also supported by substantial evidence, although that evidence appears to be contradicted elsewhere in the record. RP 19, 22.[1] ("On that night I noticed a dark colored

[1] By the officer's own testimony.

Ford Expedition that was reported stolen. The vehicle description was that it was reported stolen out of the west central area, which is approximately ten blocks west of that area"; "[The Ford] was last registered in 2016 out of California. It was not reported as stolen").

The officer provided additional information while testifying – that the Expedition had a broken-out window, and he checked the license plate affixed to the vehicle which returned as "clear." RP 20; *see also*, CP 83-84 (FF 2). As a result, the officer attempted to check the VIN, but the windows were fogged over; at that time, he was unable to confirm the VIN or whether the vehicle was, in fact, stolen. RP 20. Ultimately, at some point, Officer Wilke was able to check the VIN on the Ford. RP 22-23. The record is unclear whether the officer gained any other information from the VIN check.

Ultimately, whether the Ford was or was not stolen is irrelevant to Mr. Hiatt's possession of the stolen Honda. Those facts merely established why Officer Wilke was at the scene, why his attention was drawn to the Ford, and subsequently the Honda, and why Officer Wilke began to investigate the Honda, which also had a broken window and was chained to the Ford. Any error in this finding of fact has no material effect on the rest of the trial court's findings, nor on the court's conclusions of law. The defendant's claim that the trial court erred in entering this finding, if not

abandoned by his failure to present any argument in support, is meritless. Further, because the defendant fails to assign error to any of the trial court's other findings of fact, they are verities on appeal.

3. Sufficient evidence exists to support the trial court's conclusions of law and its verdict finding the defendant guilty of possession of a stolen motor vehicle.

Mr. Hiatt challenges the trial court's conclusions of law 1[2], 2[3], 3[4], 4[5], 6[6], 7[7], and 11[8]. He alleges the evidence was insufficient to prove beyond a reasonable doubt that he possessed the Honda. Although defendant also challenges findings of fact 2, 3, and 4, which, in part, conclude that the defendant had knowledge the vehicle was stolen, he provides no argument

[2] Conclusion of law 1: "On or about December 25, 2018, Mr. Hiatt knowingly received, retained, or possessed a stolen motor vehicle when he allowed his friend to chain the Honda Accord to his Ford Expedition." CP 86.

[3] Conclusion of law 2: "Mr. Hiatt received the Honda Accord from someone other than Mr. Chavez knowing that the vehicle belonged to Mr. Chavez." CP 86.

[4] Conclusion of law 3: "Mr. Hiatt acted with knowledge that the motor vehicle had been stolen because there was a broken window and a stuck punched out ignition key." CP 86.

[5] Conclusion of law 4: "Mr. Hiatt withheld or appropriated the Honda Accord to someone other than the true owner or person entitled to it by allowing it to be chained to his Ford Expedition." CP 86.

[6] Conclusion of law 6: "Mr. Hiatt had constructive possession of the Honda Accord because he had dominion and control over the Honda Accord." CP 86.

[7] Conclusion of law 7: "Mr. Hiatt had the ability to saw off the padlock or make the Ford Expedition operable; the Honda Accord would have been in Mr. Hiatt's actual possession. On or about December 25, 2018, Mr. Hiatt had in his possession, specifically in his pants pockets, three rings of shaved keys." CP 86.

[8] Conclusion of law 11: "The Court finds Mr. Hiatt guilty, beyond a reasonable doubt, of count 1: possession of a stolen motor vehicle." CP 86-87.

that the evidence was insufficient for the court to find he had the requisite mens rea to commit the crime of possession of stolen motor vehicle.

The evidence supports the trial court's conclusions that Mr. Hiatt possessed the stolen Honda. A person is guilty of possessing a stolen vehicle if he or she possesses a stolen vehicle. RCW 9A.56.068. RCW 9A.56.140(1) defines what it means to "possess" stolen property:

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969). To find actual possession, the property must be in one's personal custody. *Id*. at 29. "To possess" means to have actual control, care and management of, and not a passing control, fleeting or shadowy in its nature." *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994) (quoting *U.S. v. Landry*, 257 F.2d 425, 341 (7th Cir. 1958)).

The trial court properly found that the defendant had actual possession of the stolen vehicle. CP 86 (CL 1). It is irrelevant that he did not have the keys to the vehicle on his person, or the key to the chain and lock which bound the Honda to his own vehicle. The defendant's claim that in order to demonstrate actual possession, the State would need to show he

had access to the vehicle makes little logical sense. The defendant had actual possession of the vehicle because it was undisputedly chained to his own motor vehicle – therefore, he had "care" and "control" of the vehicle that was not fleeting or passing.

In contrast, constructive possession requires dominion and control over the property or the premises on which it is found. *Callahan*, 77 Wn.2d at 29-31. Close proximity alone is not enough to establish constructive possession; other facts must enable the trier of fact to infer dominion and control over the property. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). Dominion and control need not be exclusive. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). Other factors that may be considered in determining whether a defendant is in constructive possession of an item are the capacity to exclude others, *State v. Wilson*, 20 Wn. App. 592, 581 P.2d 592 (1978), and the ability to immediately reduce an object to actual possession, *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). No single factor is dispositive and the totality of the circumstances must be considered. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995).

Assuming the facts do not amount to "actual possession," there was sufficient evidence that Mr. Hiatt constructively possessed the Honda, as found by the trial Court. CP 86 (CL 6). Mr. Hiatt told police he had a

"buddy" who *asked* to leave the Honda chained exclusively to Mr. Hiatt's Ford; Mr. Hiatt *accepted* that request and knowingly *received* the property, and permitted it to be chained to his own, thereby *retaining*[9] the stolen vehicle in his "buddy's" absence. Further, at the time the vehicle was recovered, Mr. Hiatt was the only person present with any "authority" over the vehicle; it was chained to his own. As above, the lack of keys is irrelevant. Mr. Hiatt could have used bolt cutters to remove the chain, and the Honda's ignition was "punched," which would have allowed it to be started without a key. As a matter of law, the defendant possessed the stolen Honda.

Further, although the argument is not advanced by the defendant, the evidence was sufficient to establish that he had knowledge that the vehicle was stolen. A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact exists. RCW 9A.08.010(1)(b). Direct evidence and circumstantial evidence are equally reliable to establish knowledge. *See State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Possession of recently stolen property together with slight corroborative evidence of other inculpatory circumstances will support a conviction for possession of stolen property.

[9] *See* CP 89 (CL 1).

State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). The Honda was recently stolen – the day before it was found in the defendant's possession. The ignition was altered and the window was broken. The defendant also had shaved keys in his possession, which are often used to start stolen vehicles for which there is no associated key.

The trial court did not err in concluding that the facts established that the defendant had knowing possession of a stolen motor vehicle. This Court should affirm the trial court's verdict finding the defendant guilty.

B. THE STATE PROVED THE DEFENDANT'S CRIMINAL HISTORY WITH CERTIFIED COPIES OF THE DEFENDANT'S PRIOR JUDGMENTS; DEFENSE COUNSEL DID NOT VIOLATE THE DEFENDANT'S RIGHT TO AUTONOMY AND WAS NOT INEFFECTIVE AT SENTENCING.

The trial court must conduct a sentencing hearing before imposing a sentence on a defendant who has been convicted of a criminal offense. RCW 9.94A.500(1). In determining the defendant's sentence, the court must calculate the defendant's offender score, and in doing so, "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). Unless a defendant pleads guilty, he or she is not obligated to present evidence of his or her criminal history. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The State bears the burden to prove the existence of prior convictions by a preponderance of the evidence.

Id. at 909-910. "Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction." *Id*. at 910. The best evidence of a defendant's criminal history is a certified copy of the judgment. *See e.g.*, *State* v. *Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

At the defendant's original sentencing, the trial court found that he had an offender score of "15." CP 90. In written findings, it listed those prior convictions it found to exist.[10] CP 88-90.

[10] The Court's findings of fact from the August 2019 sentencing were as follows:

> 2. Mr. Hiatt has a conviction for Forgery with an incident date of 04-19-2003 and a sentencing date of 10-21-2003.
>
> 3. Mr. Hiatt has a conviction for Forgery with an incident date of 04-22-2003 and a sentencing date of 10-21-2003.
>
> 4. Mr. Hiatt has a conviction for Theft 1 with an incident date of 05-04-2002 and a sentencing date of 10-22-2003.
>
> 5. Mr. Hiatt has a conviction for Theft 2 with an incident date of 04-25-2003 and a sentencing date of 10-21-2003.
>
> 6. Mr. Hiatt has a conviction for Theft 2 with an incident date of 09-19-2005 and a sentencing date of 05-10-2006.
>
> 7. Mr. Hiatt has a conviction for Theft 2 with an incident date of 09-19-2005 and a sentencing date of 05-10-2006.
>
> 8. Mr. Hiatt has a conviction for Taking a Motor Vehicle without Permission 2 with an incident date of 10-05-2006 and a sentencing date of 12-22-2006.
>
> 9. Mr. Hiatt has a conviction for Possession of a Controlled Substance with an incident date of 10-05-2006 and a sentencing date of 12-22-2006.
>
> 10. Mr. Hiatt has a conviction for Possession of a Controlled Substance with an incident date of 07-16-2007 and a sentencing date of 02-22-2008.
>
> 11. Mr. Hiatt has a conviction for Possession of a Controlled Substance with an incident date of 01-03-2008 and a sentencing date of 02-22-2008.

The defendant has assigned error to each of the trial court's findings of fact pertaining to the existence of his prior countable offenses, claiming it was error for the court to find Mr. Hiatt had any criminal history at all. Br. at 1-2, 10-11. Defendant alleged, despite evidence in the report of proceedings to the contrary, RP 118-19, 127, that the State relied upon a "summary" of Mr. Hiatt's criminal history at sentencing. Br. at 11. Further, Mr. Hiatt claims that, by signing the understanding of criminal history over his objection, his attorney acquiesced to that criminal history without demanding the State present evidence to meet its burden and that this error was structural. Br. at 6, 11-12. Lastly, the defendant alleges that his attorney's conduct at sentencing in "stipulating" to his offenses was ineffective assistance. Br. at 13-14.

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12. Mr. Hiatt has a conviction for Possession of a Controlled Substance with an incident date of 09-02-2008 and a sentencing date of 10-17-2008.

13. Mr. Hiatt has a conviction for Possession of Stolen Property 2 with an incident date of 11-02-2010 and a sentencing date of 04-13-2011.

14. Mr. Hiatt has a conviction for Taking a Motor Vehicle without Permission 2 with an incident date of 11-02-2010 and a sentencing date of 04-13-2011.

15. Mr. Hiatt has a conviction for Possession of a Controlled Substance with an incident date of 07-06-2012 and a sentencing date of 05-14-2013.

16. Mr. Hiatt has a conviction for Possession of a Controlled Substance with an incident date of 03-24-2018 and a sentencing date of 05-17-2018.

CP 88-90.

1. Additional procedural history.

On March 31, 2020, the State moved, and was later granted, a motion to remand the matter to the sentencing court to determine which certified judgments the court used to calculate the defendant's offender score. *See* 3/31/2020 Motion to Supplement. As explained in the State's brief in support of the motion to supplement the record, the State learned that, although the report of proceedings twice indicated that the prosecutor proffered certified judgments at the original sentencing, those documents were never filed with the clerk. *See* RP 118-19, 127; 3/31/2020 Motion to Supplement.

On May 21, 2020, the sentencing court held a hearing pursuant to this Court's remand order to determine which judgments it reviewed during the original August 8, 2019, sentencing hearing to calculate the defendant's offender score. CP 238-242. The State presented eleven certified judgments, all pertaining to Mr. Hiatt, at the remand hearing that were reviewed by the court. CP 239-40 (FF 8-19); CP 96-237. Before or during the remand hearing, the court also reviewed the entire court file and a transcript of the August 8, 2019, sentencing hearing. CP 240 (FF 20). The court indicated it had a "clear recollection of the original sentencing hearing, and that the defense argument that was made was whether the defendant's prior criminal history washed out." CP 240 (FF 21-22).

Although the court did not independently recall the exact case numbers written on the certified judgments presented at the original sentencing hearing in August 2019, it found that the certified judgments presented during the May 2020 hearing were "approximately the same amount" as presented in August 2019, that "align[ed] with the defendant's criminal history"; the court believed that the judgments presented in May 2020 "satisfied Mr. Hiatt's criminal history as it was presented to the Court on August 8, 2019." CP 240-41 (FF 26, CL 5, 8-9). The court concluded the certified judgments presented by the State in May 2020 "were the same" as those reviewed at the August 8, 2019, hearing. CP 241 (CL 9). Based on those judgment and sentences, which represented an "accurate and reliable reiteration of Mr. Hiatt's criminal history," the court found the defendant's offender score to be a 15. CP 241-42 (CL 6, 11).

2. The State proved the defendant's criminal history by the use of certified copies of the defendant's prior judgments.

Because the State presented, and the court relied upon certified copies of the defendant's criminal history to determine his offender score, the defendant's claim that the court erroneously relied only upon a summary of the defendant's criminal history is incorrect. The State proved the defendant's criminal history with the best evidence of that history – the certified judgments of those convictions. *Ford*, 137 Wn.2d at 480.

3. The claim that counsel violated Mr. Hiatt's right to autonomy is not preserved; in any event, defense counsel did not violate defendant's right to autonomy.

a. This claim is not a manifest constitutional error.

Assuming that defense counsel improperly signed the statement of defendant's criminal history over his objection and averring that her signature was a stipulation to his criminal history, defendant claims that his attorney's "stipulation" to his criminal history is structural error, and violative of his right to autonomy. Br. at 11-12.

This argument was waived because the defendant did not raise it below. RAP 2.5. It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.[11] Specifically regarding RAP 2.5(a)(3), our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott,*

[11] An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

110 Wn.2d 682, 687, 757 P.2d 492 (1988). Here, the claim that counsel violated Mr. Hiatt's right to autonomy by signing the understanding of criminal history where he objected, is not manifest error, if error at all. This alleged error is not "practical and identifiable," or "so obvious on the record" that it warrants appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

The State agrees that many other structural errors, or meritorious claims of a violation to the right to autonomy may be considered manifest constitutional error, such as where defense counsel waives a jury trial or the right to appeal over a defendant's objection. Those types of constitutional violations are so well-settled as to be "obvious" or "manifest" on the record. The same cannot be said for the claim alleged here – that an attorney's signature on an "understanding of criminal history" – where the defendant's objection to that understanding is noted on the same document – violates the right to autonomy, especially where, as here, counsel clearly challenged the use of the defendant's criminal history at sentencing. The court should not consider this claim as it is not manifest constitutional error.

b. Counsel did not violate the defendant's right to autonomy.

If this Court considers the claim, the defendant's challenge fails. In support of his contention that his counsel violated his right to autonomy, Mr. Hiatt cites only *McCoy v. Louisiana*, ___ U.S. ___, 138 S.Ct. 1500,

200 L.Ed.2d 821 (2018), a case in which defense counsel's wholesale concession to his client's guilt in order to avoid the death penalty was found to violate the defendant's right to autonomy. Attempting to extend *McCoy* to fit his own circumstances, the defendant's argument in this case oversimplifies the breadth of the right to autonomy.

By retaining counsel, defendants necessarily relinquish some autonomy to their attorneys. *See Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). After all, "[t]he adversary process could not function effectively if every tactical decision required client approval." *Id.* Numerous cases demonstrate that *McCoy*'s limited application. *See e.g.*, *U.S. v. Rosemond*, 958 F.3d 111 (2d Cir. 2020) (citing *U.S. v. Holloway*, 939 F.3d 1088, 1101 n.8 (10th Cir. 2019)) (defendant's right to autonomy was not violated when attorney and defendant had "strategic disputes" about how to achieve same goal); *U.S. v. Audette*, 923 F.3d 1227, 1236 (9th Cir. 2019) (defendant's right to autonomy was not violated because he disagreed with his attorney about "which arguments to advance"); *Thompson v. U.S.*, 791 Fed. Appx 20, 26-27 (11th Cir. 2019) (defendant's right to autonomy is not violated because attorney conceded some, but not all, elements of a charged crime).

U.S. v. Wilson, ___ F.3d ___, 2020 WL 2603219 at *2 (3rd Cir. 2020), succinctly explains the interplay between a defendant's autonomous choices and counsel's tactical choices:

> The Sixth Amendment respects a defendant's right to counsel and right to autonomy by dividing ultimate decisionmaking authority between lawyer and defendant. Lawyers control tactics, while defendants get to set big-picture objectives. For tactical decisions, *like which arguments to press* and what objections to raise, the lawyer calls the shots. *See Gonzalez v. U.S.*, 553 U.S. 242, 248–49, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (citing *New York v. Hill*, 528 U.S. 110, 114–15, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000)). But fundamental decisions belong to the defendant alone: whether to plead guilty, waive a jury trial, testify, or appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

(Emphasis added.)

Here, defense counsel tactically decided that, when faced with fifteen certified copies of the defendant's judgments and sentences, the best tactical decision was to argue that the doctrine of collateral estoppel precluded the use of that criminal history.[12] This was a sound tactic, as the argument had previously worked to the defendant's advantage. CP 42. This tactic is also unlike wholly conceding a defendant's guilt during trial as in *McCoy*.

[12] The defendant has also failed to establish that counsel's signature on the understanding of criminal history was, in fact, a stipulation to that criminal history that would bind the defendant or waive counsel's other arguments against the use of that criminal history.

Mr. Hiatt's objective was to challenge the use of his criminal history at his sentencing. The defense attorney honored that objective by strategically challenging the ability to use her client's history in *this* prosecution, rather than by challenging its undeniable existence. The strategy as to how to achieve the defendant's objective was within counsel's purview. Except where counsel is ineffective, a defendant must accept certain decisions that are strategically made on his or her behalf by counsel. *See Rosemond*, 958 F.3d at 120. To hold otherwise would hamstring defense counsel's ability to make professional decisions in a client's best interest. And, ultimately, as explained above, the State proved the defendant's criminal history not by the use of counsel's signature on the understanding of criminal history, but by the use of the certified judgments establishing that criminal history. There was no violation of Mr. Hiatt's right to autonomy and certainly no structural error.

4. Counsel was not ineffective at sentencing by signing the understanding of criminal history.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). To prevail on this claim, the defendant must show his attorney was "not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment" and his error(s) were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Matter of Pirtle,* 136 Wn.2d 467, 487, 965 P.2d 593 (1998), *as amended on denial of reconsideration* (Dec. 7, 1998). Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" and to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland,* 466 U.S. at 689.

The first element of ineffectiveness is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Rice,* 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

Defense counsel was not ineffective for signing the defendant's understanding of criminal history document where her client objected to that understanding. The legitimate strategy at sentencing was to argue that the State was collaterally estopped from asserting the defendant's prior convictions where it had previously, albeit incorrectly, stipulated that those prior offenses washed out on a different matter. CP 42. Defense counsel had

no legitimate grounds upon which to dispute the existence of the defendant's prior criminal history when presented with valid, certified copies of those judgments. Additionally, her arguments as to the use of the defendant's criminal history were preserved, notwithstanding her signature on the criminal history statement.

Even if defense counsel should not have signed the document, defendant cannot demonstrate that the court would have calculated his sentence differently without counsel's signature, and, therefore, cannot demonstrate prejudice. The defendant's history consisted of fifteen prior offenses. Likely knowing the defendant would not stipulate to his criminal history, the State obtained and presented certified copies of those judgments. Defense counsel's signature on the understanding of the defendant's criminal history had no bearing on the court's finding that his criminal history had been proved. This claim likewise fails.

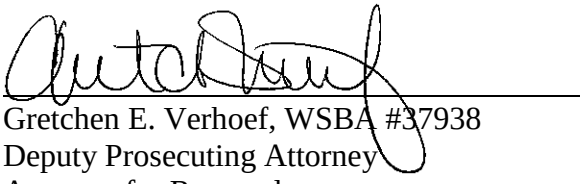
IV. CONCLUSION

The trial court's findings of facts are verities on appeal as they are unchallenged. Those findings support the court's conclusions of law; the defendant possessed the stolen Honda, knowing it to be stolen. The defendant's claims pertaining to his sentencing are meritless. The record reflects that the trial court did, in fact, consider and rely upon certified copies of the defendant's prior convictions to determine Mr. Hiatt's

offender score. The remand hearing in May 2020 confirms this. The State respectfully requests that this Court affirm the verdict and judgment.

Dated this 26 day of June, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



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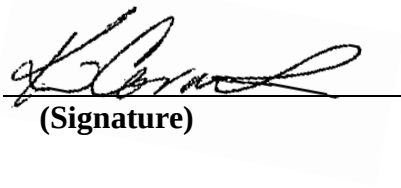
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. MICHAEL HIATT, Appellant.	NO. No. 37024-1-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on June 26, 2020, I e-mailed a copy of the Brief of Respondent in this matter, to:

Jodi Backlund and Manek Mistry
backlundmistry@gmail.com

6/26/2020 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

June 26, 2020 - 10:23 AM

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